Kumareshan a/l Subramaniam v Dato' Chor Chee Heung & Anor

HIGH COURT (MUAR) — CRIMINAL APPLICATION NO 44–4 OF 2003
JEFFREY TAN J
12 SEPTEMBER 2003

Preventive Detention *— Detention order — Grounds for detention — Application for habeas corpus to set at liberty applicant — Whether non-compliance of procedural requirements a procedural defect in procedure — Whether minister's subsequent affidavit could correct non-compliance — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1)*

This was an application for a writ of habeas corpus to set at liberty the applicant who was detained by a detention order ('the order') made pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). There were two prerequisites under the provision. The order only stated that the applicant was detained because the Minister was satisfied that he was associated with some activity involving the trafficking in dangerous drugs. The order did not disclosed that the Minister was satisfied that it was necessary in the interest of public order that the applicant be detained. It was argued that the statement that it was necessary to detain the applicant in the interest of public order should be made in the same order, and not in a subsequent affidavit after the service of the order. The issue to be determined was whether the failure to comply with the procedural requirements of s 6(1) of the Act was a defect in procedure.

Held, allowing the application:

(1) Under the Act, the Minister may direct that a person be detained, if he is satisfied that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, and if the Minister is satisfied that it is necessary in the interest of public order that such person be detained. Therefore, the Minister may direct that a person be detained only if he is satisfied on both counts. To state one and not state the other would only give the impression that the order was made on the sole basis of the one stated prerequisite. The order could not have informed the applicant that the Minister was satisfied that it was necessary in the interest of public order that he be detained. The subsequent affidavit of the Minister stating the same was done after the detention had been challenged. It should have been done at the time of service of the order (see pp 387F–I, 89E–390A).

(2) Article 151(1) of the Federal Constitution provides that the authority on whose order any person is detained shall inform him of the grounds for his detention and the allegations of fact on which the order is based. Also, the detained person shall be given the opportunity of making representations against the order as soon as possible. That right of the applicant was expended by the Act for s

A 9(2)(b) provided that the applicant shall be, at the time of service of the order, furnished with a statement containing the grounds and allegations of fact on which the detention was directed. Hence, grounds on which the detention was directed could not be disclosed after service of the order (see pp 389H–390B).

B (3) In cases of preventive detention, the provisions of the relevant statute must be strictly followed. Where personal liberty is concerned, an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. But neither the order nor the statement furnished under s 9(2) of the Act C disclosed that the Minister was satisfied that it was necessary in the interest of public order that the applicant be detained. That failure was a defect in substance and not form. The subsequent affidavit could not make good what was required to be done at the time of service of the order. It was clear that there was a failure to comply with the strict procedural requirements of the Act (see p 390B–F).

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[Bahasa Malaysia summary

Ini adalah satu permohonan untuk satu writ habeas corpus untuk membebaskan pemohon yang telah ditahan melalui satu perintah E penahanan ('perintah tersebut') yang dibuat menurut s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut'). Terdapat dua pra syarat di bawah peruntukan. Perintah tersebut hanya menyatakan bahawa pemohon ditahan kerana Menteri berpuas hati bahawa beliau terlibat dengan beberapa aktiviti pengedaran dadah berbahaya. Perintah tersebut tidak menunjukkan F bahawa Menteri berpuas hati bahawa ia adalah perlu demi kepentingan ketenteraman awam bahawa pemohon ditahan. Ia dihujahkan bahawa kenyataan bahawa ia adalah perlu untuk menahan pemohon demi kepentingan ketenteraman awam hendaklah dibuat dalam perintah yang sama, dan bukan dalam afidavit berikutnya selepas penyampaian perintah tersebut. Persoalan yang perlu G ditentukan adalah sama ada kegagalan untuk mematuhi keperluan-keperluan prosedur s 6(1) Akta tersebut adalah satu kecacatan dalam prosedur.

Diputuskan, membenarkan permohonan tersebut:

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(1) Di bawah Akta tersebut, Menteri boleh mengarah seseorang itu ditahan, jika beliau berpuas hati yang orang itu telah atau terlibat dalam apa-apa aktiviti berkaitan dengan atau melibatkan pengedaran dadah berbahaya, dan jika Menteri berpuas hati bahawa ia adalah perlu demi kepentingan ketenteraman awam I untuk seseorang itu ditahan. Oleh itu, Menteri boleh mengarahkan seseorang itu ditahan hanya jika beliau telah berpuas hati dengan kedua-dua sebab tersebut. Untuk

menyatakan hanya salah satu daripadanya akan memberikan gambaran bahawa perintah tersebut telah dibuat semata-mata berasaskan satu pra syarat yang telah dinyatakan. Perintah tersebut tidak boleh memberitahu pemohon bahawa Menteri berpuas hati bahawa ia adalah perlu demi kepentingan ketenteraman awam untuk beliau ditahan. Afidavit seterusnya Menteri tersebut yang menyatakan yang sama telah dibuat selepas penahanan tersebut dicabar. Ia sepatutnya dibuat pada masa penyampaian perintah tersebut (lihat ms 387F–I, 89E–390A).

(2) Artikel 151(1) Perlembagaan Persekutuan memperuntukkan bahawa pihak berkuasa yang memerintahkan seseorang itu ditahan hendaklah memaklumkan kepada beliau alasan-alasan untuk penahanan beliau dan pengataan-pengataan fakta di mana perintah tersebut diasaskan. Juga, orang yang ditahan tersebut hendaklah diberikan peluang untuk membuat representasi terhadap perintah tersebut dengan segera. Hak pemohon tersebut digunakan oleh Akta tersebut di mana s 9(2)(b) memperuntukkan bahawa perayu hendaklah, pada masa penyampaian perintah tersebut, mengemukakan satu kenyataan mengandungi alasan-alasan dan pengataan-pengataan fakta di mana penahanan tersebut telah diarahkan. Oleh itu, alasan-alasan di mana penahanan tersebut diarahkan tidak boleh dikemukakan selepas penyampaian perintah tersebut (lihat ms 389H–390B).

(3) Dalam kes-kes penahanan pencegahan, peruntukan-peruntukan statut yang relevan hendaklah diikuti. Di mana kebebasan persendirian berkaitan, seorang pemohon yang memohon untuk satu writ habeas corpus berhak untuk menggunakan terhadap beliau apa-apa kecacatan teknikal yang boleh menjadikan perintah tersebut tidak sah yang menghalang beliau daripada kebebasannya. Tetapi perintah tersebut maupun kenyataan tersebut yang telah dikemukakan di bawah s 9(2) Akta tersebut menunjukkan bahawa Menteri tersebut berpus hati bahawa ia adalah perlu demi kepentingan ketenteraman awam yang pemohon tersebut ditahan. Kegagalan tersebut adalah satu kecacatan dari segi substantif dan bukan bentuk. Afidavit berikutnya tidak memulihkan keadaan sepertimana yang sepatutnya dibuat pada masa penyamapian perintah tersebut. Ia adalah jelas bahawa terdapat satu kegagalan untuk mematuhi keperluan-keperluan prosedur Akta tersebut (lihat ms 390B–F).]

Notes

For cases on the grounds for detention, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1339–1348.

Cases referred to

Abd Rahman bin Haji Maidin v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2000] 3 MLJ 108 (refd)

Chan Ng v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1995] MLJU 419 (folld)

Datuk James Wong Kim Min, R [1976] 2 MLJ 245 (folld)

Low Soon Mooi v Menteri Hal Ehwal Dalam Negeri & Anor [1989] 2 MLJ 350 (refd)

Natarajan a/l K Maniam v Dato' Chor Chee Heung & Anor [2002] 4 MLJ 518 (folld)

Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 3 MLJ 28 (folld)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6(1), 9(2)(b)

Federal Constitution art 151(1)(a)

Gobind Singh Deo (*Karpal Singh & Co*) for the applicant.

Abdul Rani bin Megat Kasim (Solicitor, Attorney-General's Chambers) for the respondents.

Jeffrey Tan J: This is an application for a writ of habeas corpus, to set at liberty the applicant who is presently detained by a detention order dated 4 April 2003 and made pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act').

Section 6(1) of the Act provides as follows:

> Whenever the Minister, after considering —
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> (a) the complete report of investigation submitted under subsection 3(3); and
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> (b) the report of the Inquiry Officer submitted under subsection 5(4)
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> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

There could be no dispute about it. Under the Act, the minister may direct that a person be detained, if he is satisfied that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, and if the Minister is satisfied that it is necessary in the interest of public order that such person be detained. And there could be no two ways about it. The Minister may direct that a person be detained if he satisfied that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, and if the Minister is also satisfied that it is necessary in the interest of public order that such person be detained. The Minister may direct that a person be detained only if he is satisfied on both counts.

The instant detention order ('the order'), the material portion thereof, reads as follows:

> BAHAWASANYA selepas menimbangkan laporan lengkap penyiasatan dan laporan Pegawai Siasatan yang dikemukan, saya adalah berpuashati bahawa orang yang namanya tersebut dibawah ada atau sedang ada kaitan dengan aktiviti yang berhubungan dengan atau melibatkan pengedaran dadah berbahaya.
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> Nama Nombor Kad Pengenalan
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> KUMARESHAN A/L 770404–01–5323
>
> SUBRAMANIAM
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> MAKA, OLEH YANG DEMIKIAN. pada menjalankan kuasa yang diberi di bawah Seksyen 6(1), Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985, saya dengan ini memerintahkan supaya orang yang namanya tersebut di atas ditahan selama dua (2) tahun mulai dari 4 haribulan April 2003 di Pusat Pemulihan Akhlak, Muar, Johor atau di mana-mana tempat lain sebagaimana yang diarah dari semasa kesemasa.
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> Diperbuat pada 4 haribulan April 2003
>
> (DATO' CHOR CHEE HEUNG)
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> TIMBALAN MENTERI DALAM NEGERI, MALAYSIA

In that order was a statement that the Minister was satisfied that the applicant had been or was associated with some activity relating to or involving the trafficking in dangerous drugs. However, in that order, there was no statement that the Minister was satisfied that it was necessary in the interest of public order that the applicant be detained, a detail observed and then brought to the attention of the court by Mr Gobind Singh Deo for the applicant. Mr Abdul Rani for the respondent answered that it was plainly stated by the Minister, in his affidavit dated 10 July 2003 (encl 6), that he was satisfied that it was necessary in the interest of public order that the applicant be detained, and that the Minister was not required to state so in the detention order. Mr Gobind replied that it was *important* that when it was served on the applicant that the order must be seen to have had been made in all compliance with s 6(1) of the Act, but that affidavit of the Minister was affirmed after the order. Mr Gobind concluded by saying that to state in some subsequent affidavit but not so in the order that it was necessary in the interest of public order that the applicant be detained was a defect in procedure.

A The Act does not stipulate that a detention order must be in any particular form. For that reason, at first blush, it would appear that it could not be reasonably argued that the Minister must state in the order that he was satisfied that it was necessary in the interest of public order that the applicant be detained. The fact of the matter is that the Act does not stipulate that the order must also state, in the preamble, body, or postscript, B that the Minister was satisfied on both counts. In any case, was it not clearly stated in the order that the Minister was satisfied that the applicant was a person who had been or was associated with activity relating to or involving the trafficking in dangerous drugs, and also was it not affirmed by the Minister in his later affidavit that he was satisfied that it was necessary in the C interest of public order that the applicant be detained? Yet it could not not be asked why if it could have been stated in the order that the Minister was satisfied that the applicant was a person who had been or was associated with activity relating to or involving the trafficking in dangerous drugs, that it could not also have been stated in the same said order that the Minister was also satisfied that it was necessary in the interest of public order that the D applicant be detained. Was it not the case that if it could have been stated in the order that the Minister was satisfied that the applicant was associated or involved with the stated activity, and it could only be deduced that the Minister must have had good reason to do so, that it should also have been stated in the same order that the Minister was satisfied that it was necessary in the interest of public order that the applicant be detained? Was it not the E case that the reason for stating in the order that the Minister was satisfied with respect to the first prerequisite was also equal reason for stating that the Minister was satisfied with respect to the second prerequisite? The second prerequisite was also of the essence. The second prerequisite was no less important. But to state one and not the other would only give the F impression that the order was made on the sole basis of the one stated prerequisite. That would be the implication if one of the two prerequisites were left out. At the very least, there would be room for debate if one of the two prerequisites were left out. But there could be no dispute that the instant order openly stated that the Minister directed that the applicant be detained on the basis that he was satisfied that the applicant had been or was G associated with activity relating to or involving the trafficking of dangerous drugs. With respect to the second prerequisite, there was not a word, edgeways or otherwise, in the order. Obviously, that order could not have informed the applicant that the Minister was satisfied that it was necessary in the interest of public order that he be detained.

H In his affidavit, the Minister affirmed that he was satisfied that it was necessary in the interest of public order that the applicant be detained. But that was done after detention had been challenged. Whereas that should have been done at the time of service of the order. Article 151(1)(a) of the Federal Constitution provides that 'the authority on whose order any person is detained ... shall as soon as may be, inform him of the grounds for I his detention and ... the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as possible'. And that right of the applicant was expended by the

Act, for s 9(2)(b) provided that the applicant shall at the time of service of the order be furnished with a statement containing the grounds and allegations of fact on which detention was directed (see *Chan Ng v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1995] MLJU 419, and *Natarajan a/l K Maniam v Dato' Chor Chee Heung & Anor* [2002] 4 MLJ 518). Hence, grounds on which detention was directed could not be disclosed after service of the order. Time and time again, it has been said that in cases of preventive detention, the provisions of the relevant statute must be strictly followed (see *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28, at p 30). 'Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty' (*Re Datuk James Wong Kim Min* [1976] 2 MLJ 245, per Lee Hun Hoe CJ (Borneo). But neither the order nor the statement furnished under s 9(2) disclosed that the Minister was satisfied that it was necessary in the interest of public order that the applicant be detained. And that failure was a defect to substance and not form (see *Abd Rahman bin Haji Maidin v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2000] 3 MLJ 108). The instant order could not even be compared with the detention order in *Low Soon Mooi v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 2 MLJ 350, where it was submitted that the Minister was required to be satisfied with two matters but that there was a failure to comply with s 6 of the Act in that the detention order only stated that the Minister was satisfied with only one matter, and where it was held by Wan Adnan J (as he then was) that the detention order which read, 'Bahawasanya saya, Menteri Dalam Negeri, berpuashati yang perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan apa-apa aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya ...' was not any failure of strict compliance. With respect, the subsequent affidavit could not make good what was required to be done at the time of service of the order. It is clear that there was failure to comply with the procedural requirements of the Act. It is therefore ordered that the applicant be set at liberty.

Application allowed.

Reported by Ezatul Zuria Azhari